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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 604

AJAX TRUCKING COMPANY, INC.,
Appellant,

vs.

ROLLIN BROWNE, GLEN R. BEDENKAPP AND JOSEPH M. MESNIG, AS AND CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The Petitioner-Appellant above named, respectfully submits the following jurisdictional statement pursuant to Rule 12 of the Rules of the Supreme Court of the United States:

1. The statutory provision which the Petitioner-Appellant believes sustains the juridiction of this Court is Section 237 (a) of the Judicial Code, 28 U. S. Code, Judiciary and Judicial Procedure as amended effective September 1, 1948, Section 1257 (2), formerly U. S. C. A., title 28, Section 344; the Statute of New York State, the validity of which is involved, is Section 184, Article 9 of the Tax Law of the State of New York, a verbatim copy of said section being

attached hereto and made a part of this jurisdictional statement as if set forth in this paragraph at length. The date of the final order and final judgment sought to be reversed in the above cause is November 24, 1948 and the date upon which the application for this appeal is presented is February 8, 1949.

2. The nature of the cause and the rulings of the Court below were and are such as to bring this case within the jurisdictional provisions hereinbefore set forth, as is set forth more fully hereafter.

3. On August 30, 1940, November 29, 1940, February 7, 1941 and March 28, 1941 the Department of Taxation and Finance of the State of New York issued assessments against your Petitioner for franchise taxes, pursuant to Section 184, Article 9 of the Tax Law of the State of New York; said assessments covering the year ending June 30, 1935, the quarter ending September 30, 1935 to and including the quarter ending March 31, 1940, the quarter ending June 30, 1940, the quarter ending September 30, 1940, and the quarter ending December 31, 1940. Said assessments, in their entirety, comprise the total sum of $5,525.54.

4. By petitions each verified under date of April 8, 1941, directed against each separate and distinct assessment so made as aforesaid, your Petitioner applied to the Department of Taxation and Finance, State of New York, for a hearing before said Tax Commission, pursuant to the provisions of Section 198 of the Tax Law of the State of New York, and for revision and readjustment of each assessment so made. Each petition so made set forth that the taxes so assessed, in each instance, were assessed upon gross earnings derived by the Petitioner from transportation (trucking) services rendered by it of an interstate character. Further, each petition alleged that the assessment upon

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such income was not authorized by statute and was illegal and void, and that said assessment included taxes which could not be lawfully demanded or collected; further, each petition set forth that the assessment was violative of the Commerce Clause of the Constitution of the United States and constituted a burden upon and regulation of said commerce (fols. 100-105; 403-408 of the printed record on appeal in the Court of Appeals).

5. A formal hearing was held at the office of the Department of Taxation and Finance, Corporation Tax Bureau, State of New York, in New York City, on April 7, 1942. Since all the assessments involved a common question, the same were the subject of a common hearing. At this hearing the Petitioner established that its gross earnings derived from transportation (trucking) services rendered to others (included in the tax base of each respective assessment herein) constituted gross earnings from trucking services which were an indispensably integral link in and part of the chain of goods moving in interstate commerce (pp. 39-128 of the printed record on appeal in the Court of Appeals).

6. On August 16, 1944 the Respondents, the State Tax Commission of the State of New York, issued its final determination that each of the aforesaid assessments so made should be affirmed and that your Petitioner was liable, under the provisions of Section 184, Article 9 of the Tax Law of the State of New York, for the aforesaid sum so determined to be due (fols. 385-390 of printed record on appeal in the Court of Appeals).

7. By a petition dated and verified the 4th day of November, 1944, your Petitioner instituted a proceeding against the above named Respondents in the Supreme Court of the State of New York, Albany County, setting forth that each assessment so made and affirmed by the Respondents was

void, illegal, erroneous and contrary to statute in that the gross earnings constituting the base of each assessment were derived from a business of an interstate character (fols. 19-41 of printed record on appeal in the Court of Appeals).

8. The above named Respondents filed their Answer and Return verified November 20, 1944, specifically denying that the transportation business from which Petitioner derived its taxed gross income constituted business of an interstate character; further, the said Answer alleged that each assessment so made and affirmed by the Respondents was lawfully assessed against the Petitioner under and pursuant to the provisions of Section 184 of the Tax Law of the State of New York (fols. 43-114 of printed record on appeal in the Court of Appeals).

9. On the 8th day of December, 1944, by an Order of a Justice of the Supreme Court, State of New York, the aforesaid proceeding instituted by Petitioner before the Supreme Court of the State of New York held in and for the County of Albany, was transferred for disposition to a term of the Appellate Division of the Supreme Court in the Third Judicial Department, in accordance with the provisions of Section 1296 of the Civil Practice Act of the State of New York, to the end that the determination of the State Tax Commission might be reviewed upon the law and upon the facts (fols. 7-12 of the printed record on appeal in the Court of Appeals).

10. The Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, affirmed the determination of the State Tax Commission (Hill, P. J. dissenting) by an Order dated at a term of the said Appellate Division commencing November 10, 1947 and entered in the office of the Clerk of the County of Albany on November 20,

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1947 (fols. 427-431 of the printed record on appeal in the Court of Appeals). That the said Appellate Division handed down an opinion for affirmance and a dissenting opinion of Hill, P. J. (fols. 433-440 of the printed record on appeal in the Court of Appeals). A copy of the aforesaid opinion of the Appellate Division of the Supreme Court of the State of New York, is annexed hereto and made part hereof as if fully set forth in this paragraph; said opinion being officially reported in *272 App. Div. 1087.*

11. Thereafter, on the 6th day of January, 1948 an appeal from the aforesaid Order of the Appellate Division was taken by the Petitioner to the Court of Appeals of the State of New York (fols. 421-425 of the printed record on appeal in the Court of Appeals).

12. Thereafter, the aforesaid cause was argued before the Court of Appeals of the State of New York. By decision dated and handed down on November 24, 1948, the Court of Appeals affirmed the foresaid Order of the Appellate Division without opinion. In its remittitur, dated November 24, 1948, the said Court of Appeals specifically set forth as follows:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The Appellant contended that the application of Section 184, Article 9 of the Tax Law of the State of New York, as made in this case is violative of Article 1, Section 8 of the Constitution of the United States. This Court held to the contrary."

A copy of the said decision of the Court of Appeals is attached hereto and made part hereof as if fully set forth in this paragraph; said decision being reported in *298 N. Y. 736, advance sheets of January 1, 1949.*

13. On December 3, 1948, an Order was made by the Honorable Roscoe V. Elsworth, Justice of the Supreme Court of the State of New York, based on the aforesaid remittitur of the Court of Appeals, making the said Order and Judgment of the Appellate Courts the order of the said Supreme Court, and confirming the aforesaid determination of the State Tax Commission. Thereafter, on the 7th day of December, 1948, the aforesaid remittitur of the Court of Appeals and the Order of Justice Elsworth was filed in the Office of the County Clerk of Albany County and an Order of Confirmance dated December 7, 1948 was made and entered thereon.

14. The questions involved in this cause are substantial and the issues involve matters of far reaching effect. It is only by the determination of the Supreme Court of the United States that the issues can be determined conclusively and finally, not alone as they affect your Petitioner but all those engaged in the business of transportation (trucking). The gross receipts of Petitioner taxed by the State of New York under Section 184 of the Tax Law, the subject of the proceeding herein, arose from compensation received by the Petitioner from the trucking of merchandise all of which had their situs, were sold and shipped from without the State of New York. Under a through transportation commitment between the shipper-vendor without the State of New York and the customer in New York, the goods were transported to New York. There the Petitioner-Appellant, by contractual commitment with the shipper-vendor, continued the movement of the goods to the customers of the shipper-vendor in the State of New York. It was demonstrated that the intent was that the goods so trucked by the Petitioner-Appellant were intended to move, as they did move, from point of origin without the State of New York to the customer in the State of New York. It was further

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demonstrated that although the Petitioner-Appellant's trucking services were physically confined to the boundaries of the State of New York, the shipper-vendor without the State contractually engaged the Petitioner-Appellant's trucking facilities to complete the interstate movement of the goods to the customer in New York State; further, that the transportation services rendered by the Petitioner-Appellant constituted an integral and indispensable part of the movement of the goods from mill outside the State to the customer within the State of New York.

The Petitioner-Appellant is only one of many trucking companies in the State of New York and elsewhere, moving goods under the aforesaid conditions. Needless to say, the trucking industry is vast, far flung, and represents millions of dollars in income. The determination in this case, involving as it does, the constitutional right of the State of New York to tax gross receipts of the nature herein involved, is of substantial and far reaching import not only to Petitioner-Appellant but to like companies. Further, the determination in this case is of substantial and far reaching import insofar as the general public is concerned since the tax element will necessarily become and remain a factor in the ultimate cost of goods acquired. Further, the determination in this case is of substantial and far reaching import to the Petitioner and like companies in that it will be, become and remain a vital factor in the ability of the Petitioner and like companies to compete on an equal basis with carriers that now receive preferential treatment solely because they institute and complete an interstate movement without the employment of an auxiliary or intervening carrier.

15. The Petitioner is of the firm belief that if the present decision of the Court of Appeals shall stand, without review, then the decisions of the Supreme Court of the United States

in *Puget Sound & Co.* v. *Tax Commissioner*, 302 U. S. 90; *United States* v. *Erie Railroad Co.*, 280 U. S. 98; *United States* v. *Yellow Cab Co.*, 322 U. S. 218; *Freeman* v. *Hewitt*, 329 U. S. 249, among others in the long line of cases involving the question herein, culminating in the decision of the United States Supreme Court in the matters of *Joseph et al.* v. *Carter & Weeks Stevedoring Co.*, and *Same* v. *John T. Clark & Son*, 330 U. S. 422, will, in effect, be overruled by the aforesaid decision of the Court of Appeals; whereas, if a further review be made, a determination of the Supreme Court of the United States on this question will, it is believed, result in reversal of the judgment below and the sustaining of the previous decisions of the Supreme Court of the United States or, in the alternative, if the decision of the Supreme Court of the United States in this matter shall be adverse to your Petitioner, then the Supreme Court of the United States will have made the determination that its own prior decisions are to be overruled.

16. Your Petitioner respectfully submits that the decisions of the United States Supreme Court have clearly determined that the gross earnings from transportation services of the character involved in the case at bar constitute gross earnings from a business of an interstate character and that their taxation constituted an undue discriminatory burden on commerce.

17. The Petitioner respectfully submits that the question of law involved herein should be reviewed by the United States Supreme Court. In the absence of a final determination by ultimate authority, as the Supreme Court of the United States, the rights, obligations and responsibilities of the Petitioner and others similarly situated are left uncertain, undefined and dependent upon several and independent litigation under the Courts of the various States.

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Wherefore, the Petitioner-Appellant prays for the allowance of an appeal from the Court of Appeals for the State of New York, the highest Court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final order and final judgment may be examined and reversed, and your Petitioner-Appellant further prays that on account of the errors hereinbefore assigned the final order and judgment of the Court of Appeals for the State of New York dated the 24th day of November, 1948 in the above entitled cause, be reversed and judgment entered in favor of this Petitioner-Appellant.

Dated, New York City, the 3rd day of February, 1949.

AJAX TRUCKING COMPANY, INC.,
By ARTHUR G. MCKEEVER, *President,*
Petitioner.

SIDNEY MEYERS,
Counsel for Appellant.

WILLIAM WEINTRAUB,
Of Counsel.

APPENDIX "A"

SECTION 184 OF ARTICLE 9 OF THE TAX LAW OF THE STATE OF NEW YORK—AS IN EFFECT FROM MAY 6, 1935 UNTIL MAY 11, 1936:

Additional franchise tax on transportation and transmission corporations and associations. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, steam surface railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the City of New York under a lease granted by the City), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business or formed for or principally engaged in the conduct of two or more of such businesses, and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under sections one hundred eighty-five or one hundred eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state, an excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character.

SECTION 184 OF ARTICLE 9 OF THE TAX LAW OF THE STATE OF NEW YORK—AS IN EFFECT FROM MAY 11, 1936 CONTINUOUSLY TO DATE.

Additional franchise tax on transportation and transmission corporations and associations. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the City of New

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York under a lease granted by the City), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state, an excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings from all sources within this state, which shall include gross earnings from transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character, and during the period that the state tax on motor fuel exceeds two cents per gallon the corporations, herein classed as "taxicab", and which do not transport or convey more than five persons at any one time in a single conveyance and do not operate over a fixed route, shall be taxed by the state on their franchises under the provisions of article nine-(a) of the Tax Laws and as other business corporations are taxed and not upon their gross receipts. Any corporation, joint-stock company or association formed for or principally engaged in the conduct of subway railroad, elevated railroad, or surface railroad not operated by steam, business, whose property is leased to another railroad corporation, shall only be required under this section to pay an annual tax of three per centum upon the dividends paid during the year ending on the thirtieth day of June in excess of four per centum upon the amount of its capital stock, except that where the property leased is operated by a receiver and the gross earnings are not included with the gross earnings of the lessee for the purposes of taxation under this section, then such receiver shall be required to pay the tax upon gross earnings as hereinbefore provided.

APPENDIX "B"

COURT OF APPEALS
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 24th day of November in the year of our Lord one thousand nine hundred and forty-eight, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 24, 1948

In the Matter of the Application of AJAX TRUCKING COMPANY, INC., *Appellant,*

ag'st

ROLLIN BROWNE & ors. as and constituting the State Tax Commission of the State of New York, *Respondents,*

to review a determination &c.

Be it Remembered. That on the 28th day of April in the year of our Lord one thousand nine hundred and forty-eight, Ajax Trucking Company, Inc., the appellant—in this cause, came here unto the Court of Appeals, by Sidney Meyers, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Rollin Browne & ors., as and constituting the State Tax Commission of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Sidney Meyers, of counsel for the appellant, and by Mr. Henry S. Manley, of counsel for the respondents, and after due deliberation had thereon, did

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order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. A question under the constition of the United States was presented and necessarily passed upon. The appellant contended that the application of Section 184, Article 9, of the Tax Law of the State of New York, as made in this case, is violative of Article I, Section 8, of the constitution of the United States. This court held to the contrary.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed with costs, &c, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(Sgd.) JOHN LUDDEN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 24, 1948.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] (Sgd.) JOHN LUDDEN,
Clerk.

APPENDIX "C"

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

Decision handed down November 19, 1947

In the Matter of the Application of

AJAX TRUCKING COMPANY, INC., *Appellant*,

v.

ROLLIN BROWNE AND OTHERS, as and constituting the State Tax Commission of the State of New York, *Respondents*,

To review a determination made under Section 184 of the Tax Law.

Review under Article 78 of the Civil Practice Act of a final determination of the State Tax Commission made August 16, 1944, which, after application for revision, affirmed certain franchise taxes and penalties theretofore assessed against petitioner-appellant under Section 184 of the Tax Law.

Decision of the Appellate Division

Relator, a domestic transportation corporation, failed over a considerable period to report its gross earnings as required by the Tax Law (Section 192, subd. 2), as a basis of taxes thereon imposed by Section 184 of the said statute. When it did report at the instance of the Delinquent Division of the Tax Commission, and thereafter during the tax periods in question, it took the position that all of its gross earnings were non-taxable because derived from its business which was interstate in character. The Commission thereafter made a field audit and investigation of relator's business and assessed franchise taxes and penalties upon its entire gross earnings for the periods under review. Upon the review of these assessments relator produced evidence

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which disclosed that a part of said earnings were derived from a part of its business which was interstate in character, but its proof failed to discharge its burden of showing the part or amount of the assessed taxes which were erroneous as having been laid upon its earnings thus derived. To be relieved of the taxes complained of, this was its burden, and it did not sustain it "by showing that something was improperly included without showing how much" (*People ex rel. Kohlman & Co.* v. *Law, 239 N. Y. 346, 351*). On the record before us we may not remit because it does not appear that in assessing the taxes in question the Commission proceeded upon a principle or theory fundamentally erroneous.

Determination confirmed with $50.00 costs and disbursements.

Hefferman, Brewster, Foster and Russell, JJ., concur.

APPENDIX "D"

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

Decision handed down November 19, 1947

In the Matter of the Application of

AJAX TRUCKING COMPANY, INC., *Appellant,*

v.

ROLLIN BROWNE AND OTHERS, as and constituting the State Tax Commission of the State of New York, *Respondents,*

to review a determination made under Section 184 of the Tax Law.

Review under Article 78 of the Civil Practice Act of a final determination of the State Tax Commission made August 16, 1944, which, after application for revision, af-

firmed certain franchise taxes and penalties theretofore assessed against petitioner-appellant under Section 184 of the Tax Law.

Dissenting Opinion

HILL, P. J., dissents with the following statement:

The American Woolen Company account was all interstate commerce and not subject to tax. The amount thereof is ascertainable by a simple computation.

(1231)

No. 604. AJAX TRUCKING CO., INC. *v.* BROWNE ET AL., CONSTITUTING THE STATE TAX COMMISSION. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed. *Matson Navigation Co.* v. *State*

Board of Equalization, 297 U. S. 441. *Sidney Meyers* for appellant. Reported below: 298 N. Y. 736, 83 N. E. 2d 144.